United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2113

To be argued by
RHONDA AMKRAUT BAYER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES ex rel. ALLEN M. ANDERSON, :

Petitioner-Appellant, :

-against- :

J. LELAND CASSCLES, Superintendent of Great Meadow Correctional Facility, :

Respondent-Appellee. :

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P/S

[ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK]

BRIEF FOR APPELEE

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2

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

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----------X

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BRIEF FOR APPELLEE

ON APPEAL FROM
AN ORDER OF THE
UNITED STATES
DISTRICT COURT FOR
THE NORTHERN DISTRICT
OF NEW YORK

Questions Presented

1. Has appellant exhausted his state court remedies as required by 28 U.S.C. § 2254(b) with regard to each of his claims?

2. Has appellant demonstrated that the jury selection procedures used in Albany County at the time of his trial resulted in an unconstitutionally constituted jury panel?

Statement

In this habeas corpus proceeding, Allen M. Anderson appeals from a decision of the United States District Court for the Northern District of New York (Port, J.) rendered March 17, 1975, dismissing the petition which raised the following contentions: (a) that students were systematically and intentionally excluded from petitioner's jury panel and that this exclusion was constitutionally impermissible; (b) the underrepresentation of blacks on petitioner's jury panel was constitutionally impermissible; (c) that the Albany County Jury Commissioner failed to abide by the provisions of New York Judiciary Law, §§ 650-689 and that this failure deprived petitioner of his right to equal protection of the law.

Statement of Facts

Petitioner was indicted on October 19, 1972 by an Albany County Court Grand Jury for the crime of Assault in the Second Degree (two counts).

After a hearing, petitioner's challenge to the jury panel was denied by the Albany County Court (Clyne, J.) by order entered February 23, 1973.

Petitioner was convicted, after a jury trial of both counts of Assault in the Second Degree and was sentenced on March 8, 1973 to a five year term of imprisonment on each count, to run concurrently.

Prior Proceedings

A. State Court

(1) The Pre-Trial Hearing.

Prior to petitioner's trial he made a challenge to the jury panel and a hearing was held before the Hon. John J. Clyne, Albany County Court Judge, on February 14, 1973.* The grounds upon which this challenge was made were that black persons, culturally different persons, persons of lower economic status, as well as persons of lower ages, had been systematically excluded from and underrepresented on the jury panel.

The defense called two witnesses.

RICHARD P. HAGGERTY testified that he was the Commissioner of Jurors for the County of Albany (A:24) and described the procedures used to obtain names for jury panels. He testified that names were selected from the city directory, the telephone book and election district books. Names were selected from the election books first (A:25). When a name is selected, the office files are checked to insure that the name is not already in the file. If it is not, forms are

*This hearing was ordered by the court despite the fact conceded by defense counsel that the moving papers contained merely conclusory allegations and failed to set forth any factual allegations in support of the claim. (A:10, 14-15, 22)

sent to the persons selected (A:25). These forms are sent out every day (A:26). When the form is returned, it is reviewed to determine eligibility for jury service. If the form indicates that the person responding is eligible, a slip is made with his name on it (A:25). The slips are placed in a drum which contains the names of all eligible jurors in Albany County (A:25, 26) thirty days later (A:31).

Records are kept of the forms which are received but not of the forms sent out (A:27). Approximately twenty-five percent of those to whom the forms are sent respond (A:27). Those who do not respond are sent another form when the search for names begins anew and their names are discovered to be absent from the office's files (A:31).

A record is kept of disqualified persons responding to the form (A:31).

Jurors in Albany County are selected by drawing names from the drum. Names are drawn from the drum each month (A:31).

Students were exempted from jury service until out of school upon their claim that they are in school, will not be home until a particular time and the office was unable to promise them that they could be on the jury during the period when they are at home (A:32).

The Commissioner did not know what percentage of county jurors resided in the City of Albany (A:33).

If someone writes to the Commissioner requesting to serve on a jury, a form is sent to them (A:33-34).

Any woman who responded to the form indicating her sex and desire not to serve was exempted from service. This exemption was granted only in the case of a woman who expressed her desire not to serve; if this request is not made, the woman is permitted to serve (A:34).

Mr. Haggerty did not know the number of black persons who had served on the jury during the preceding year (A:35). He had no way of knowing whether a person was receiving public assistance (A:35).

Persons under twenty-one years of age and over seventy-two were excluded from jury service (A:36).

Mr. Haggerty had attempted to add the names of black persons to the jury panel by sending additional forms and personally speaking to persons within wards he knew to be predominantly black (A:38). Some do not send the forms back, others do indicating they are working; women indicating they are working and can not get time off, the men claiming they work and have three or four children. Such persons were disqualified or exempted for the time being (A:39).

On cross-examination, Mr. Haggerty testified that the only basis for exclusion of black persons from the jury is their qualifications pursuant to the Judiciary Law and at their own request (A:40). The names of all jurors in the county are placed in the drum; no distinction is made among the residents of various cities within the county (A:40-41). Five hundred names are selected from the drum in December and placed in a second drum. It is from this latter drum that the grand jurors for the year are chosen (A:40).

Many of the forms sent are returned unanswered (A:41). The assessment rolls nor the census are used as a source of names (A:43). The form sent do not contain questions as to a person's race (A:43). When a form is returned, neither the Commissioner nor any member of his staff is able to determine the race of the person responding (A:43).

If a person is exempt but not disqualified from jury service, such person will serve on the jury unless he requests to be excused (A:44-5). Exemptions must be affirmatively claimed in order to be excused from jury service (A:45). The Commissioner had not promulgated any special rules in reference to the selection of jurors in addition to the provisions of the judiciary law (A:46).

On redirect examination Commissioner Haggerty testified that he attempted to reach black persons in the community by sending forms to districts which are predominantly black. The rate of return in such districts is poor (A:47). Persons who do not wish to serve but do not qualify for exemption had been exempted (A:47).

When questioned by the Court Mr. Haggerty testified that he had been Commissioner of Jurors for almost two years (A:48) and serves on the Common Council of the City of Albany representing the Sixth Ward (1A:48). He had made an extra effort, since being Commissioner, to forward a greater number of questionnaires to districts which, from his experience there, was having a concentration of black individuals (A:48-49).

On recross-examination Commissioner Haggerty testified that those persons excused from jury duty who do not qualify for exemption, are excused solely on the basis of economic hardship set forth affirmatively in the return (A:50). The granting or denying of a request to be excused is not predicated on race or any other claissifcation (A:50).

A copy of the form sent to persons within the county by the Commissioner of Jurors was given to the court (A:51).

HARRY HAMILTON testified that he was an Associate Professor of Atmospheric Science at the State University of New York, Albany. He held a Bachelor's Degree, a Master's Degree and a Doctor of Philosophy in Meterology.

He had been the president of the Albany branch of the National Association for the Advancement of Colored People since December of 1968 (A:52-53). In addition, he was the coordinator of the Albany Black Coalition, an umbrella of about twenty black organizations in the City of Albany, and a member of the Urban League of Albany (A:53).

At the State University, Mr. Hamilton had an appointment in the Department of Afro-American Studies for one year and for three years directed the Educational Opportunity Program. Seventy to eighty percent of the students in this program were black (A:53).

Dr. Hamilton had had a number of opportunities to discuss the problems which concern and involve black persons as a result of his affiliation with black organizations (A:53-54). The primary function of the NAACP is to work towards a resolution of some of these problems (A:54). In his capacity as President of the Albany branch of this organization, Dr. Hamilton was not aware of efforts made in the County to obtain greater participation by black persons on jury panels (A:54).

Dr. Hamilton testified that in his work in atmospheric science, he often dealt in statistics and had a number of

courses in statistics (A:56). Dr. Hamilton further testified that the 1970 U.S. Census figures indicated that there were 13,975 blacks residing in the City of Albany and that the total population of the city 115, 781; which meant that blacks were 12% of the city population (A:57). Using the binomial theorem and binomial distribution, Dr. Hamilton testified that if out of the total population of the city 50 people were randomly selected, there would be a 4% chance that there would be one black among them (A:57-58).

Dr. Hamilton testified that there are different levels of significance in reference to statistics. One of them, the most common, is taken at 5%. If a situation is significant at the 5%, it is generally conceded that the example was not random because the percentage was so low (A:58-59).

Dr. Hamilton testified that there was a higher incidence of unlisted telephone numbers among the black population than among white persons (A:60).

Dr. Hamilton had not participated in any study of the trial jury situation in Albany County (A:62).

He had been a resident of Albany County for eight years (A:63) Neither he nor his wife received a questionnaire from the Commissioner of Jurors to serve on a jury (A:64).

On questioning by the court, Dr. Hamilton testified that he had not calculated the probability of one black person

sitting on a jury panel of 65 persons chosen countywide (A:64).

A recess was ordered to enable Dr. Hamilton to calculate the percentages (A:64).

Dr. Hamilton calculated the probability to be 10% and testified that anything that is significant at the 10% level is considered non-random, but not highly unlikely (A:66). His conclusions were based solely on statistics (A:66).

On cross-examination, Dr. Hamilton testified that his figures were based on the U.S. Census and in no way reflected the number of registered voters in the county. Thus unless the total black population of the county were registered voters the result of his statistical calculation would be different (A:67-68).

He had never observed the selection of jurors by the Commissioner (A:68).

He had no knowledge of the identification of potential jurors by race and their exclusion on that basis (A:68).

On examination by the court, Dr. Hamilton testified that he was not familiar with the manner in which jurors were selected in the county (A:70). He felt that blacks were excluded from jury panels in the county and that opinion was based on four factors: conversations with other persons, observation of a small number of trials in the county and

police courts, a study that had been done seven years earlier and his understanding of the procedures used (A:70-71).

The people did not call any witnesses.

The court, in a three page memorandum decision, reviewed the testimony and held that intentional and systematic discrimination must be proved in order to sustain a claim of an illegally constituted jury and that a showing of mathematical disparity, without more, was insufficient to meet that burden. The court, thus, denied petitioner's challenge to the panel (A:74-76).

(2) Appeal

An appeal was taken from the judgment of conviction to the Appellate Division, Third Department. That Court unanimously affirmed the conviction holding that at the pre-trial hearing "there was insufficient proof of systematic exclusion of blacks and others from jury service." People v. Anderson, 42 A D 2d 1007, 1008 (3d Dept. 1973) Leave to appeal to the Court of Appeals was denied on December 18, 1973.

B. Federal Court

On March 17, 1975 the District Court rendered a detailed reasoned decision denying petitioner's application and dismissing the petition.

The court ruled that petitioner "has had a full and fair hearing that resulted in reliable findings by the State Court, which are supported by the record" (A:3). The court also noted its agreement with the conclusions of the Albany County Court.

POINT I

THE DETERMINATION OF THE STATE COURT MADE AFTER A FULL HEARING ON THE MERITS OF APPELLANT'S CHALLENGE TO THE JURY PANEL IS ENTITLED TO A PRESUMPTION OF CORRECTNESS IN ACCORDANCE WITH 28 U.S.C. § 2254(d).

Although appellant's moving papers failed to set forth any factual allegations to support his challenge to the jury panel, the state trial court granted a hearing "in order to provide the defendant an opportunity to develop factual allegations in support of his challenge to the panel." (A. 74).

The defense was not precluded in any way from presenting to the court all the evidence it had on the issues raised. No offer of proof was ever refused. Appellant was represented by counsel at the hearing. The determination of the state court is evidenced by a three page decision (A. 74-76) in which the court reviewed the testimony, articulated the constitutional standards which it applied, and, after applying what is clearly the correct legal standard governing such claims to the facts as found, denied the challenge. As noted by the court below, "petitioner has had a full and fair hearing that resulted in reliable findings by the state court, which

are supported by the record." (A. 3). Appellant has not only failed to establish, but has not even asserted that any of the exceptions enumerated in 28 U.S.C. § 2254(d) is applicable.

A state court determination made after a full and fair hearing is presumptively proper 28 U.S.C. § 2254(d); LaVallee v. Delle Rose, 410 U.S. 690(1973); United States ex rel. Sabella v. Follette, 432 F. 2d 572 (2d Cir. 1970). The opinion of the state trial court meets the requirement of 28 U.S.C. § 2254(d). Appellant has received an evidentiary hearing in the state court and is not entitled to a second hearing in the federal court or to any change in the state court decision.

POINT II

APPELLANT HAS FAILED TO DEMONSTRATE THAT JURY SELECTION PROCEDURES USED IN ALBANY COUNTY SYSTEMATICALLY AND INTENTIONALLY EXCLUDED ANY IDENTIFIABLE CLASS OF PERSONS.

A. Temporarily excusing students from jury service for the duration of their formal education is not constitutionally impermissible.

Appellant contends that students were intentionally and systematically excluded from his jury panel. The sole evidence offered at the pre-trial hearing in support of this claim is the following testimony of Commissioner Haggerty:

"Q Let me rephrase the question. Are people who are students automatically excluded from jury selection?
A. They are automatically -- we put them off, we exempt them for the time being, until they are out of school, because some of them put on the back that they are in school and they won't be home until a certain time, and we can't promise them then that they can be on the jury." (A: 32).

Commissioner Haggerty further testifed that unless someone affirmatively requested to be excused, their name was entered on the jury list (A: 45). The testimony is clear that only those students who indicate a desire to be excused for hardship reasons are temporarily excused and those are restored to the jury list when their schooling was over.

No further evidence was offered at the hearing to indicate the number of prospective jurors effected by this policy.* Nor does the record contain any evidence to indicate

*The figures offered to the federal judiciary are not meaningful either for they do not reflect the number of students who were otherwise disqualified or entitled to an exemption, e.g. women.

that county residents who were employed but attending local schools part time were similarly excused from jury service.

Thus, appellant failed to show that all students were systematically excluded from jury service, and it is his burden to establish such exclusion, e.g. Akins v. Texas, 325 U.S. 398(1945); Hernandez v. Texas, 347 U.S. 475,(1954).

Moreover, excusing students temporarily from jury service until their education is completed is entirely reasonable and constitutionally permissible. The identical claim was presented to the federal courts when students were excused, upon their request from service on federal juries, on the authority of 28 U.S.C. § 1863(b)(5). The United States Court of Appeals held:

> "[T]he court could reasonably conclude that missing class and study time is more of a hardship for students than missing work is for other occupational groups. Cf. Duncan v. United States, supra, 456 F. 2d at 1405. This is particularly so in light of the fact that jurors receive a fee for their services, which at least in part alleviates the burden to wage earners. 28 U.S.C. § 1871. Loss of education time is not so easily compensated."

United States v. Ross, 468 F. 2d 1213, 1219 (9th Cir. 1972) cert. denied 410 U.S. 989.

In Duncan v. United States, 456 F. 2d 1401, 1405 (9th Cir. 1972) the court declared:

> "Allowing as best we can for the fact that each of the members of this panel is considerably more than 21 years old, we can still find good reason for excluding persons 18 years old or over, but under 21 from jury service. We take judicial notice, as did the trial judge of the fact that today a very high percentage of persons in the 18-20 age bracket are in school or college. We know, too, that they are often away from their home communities. To call them out of school or college to serve on juries could be a considerable harship on them, and could prolong their period of education. Congress can validly consider a fully educated citizenry more important than jury service by those still in the educational process."

In Thiel v. Southern Pacific Co., 328 U.S. 217, 220(1946)(in which the Court particularly emphasized the fact that its decision was the result of the exercise of its supervisory powers over the administration of justice in the federal courts) the Court noted that the American system contemplates an impartial jury from a cross section of the community.

"This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community...

But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups." Students, as a class, do not represent any of these groups. See Ware v. United States, 356 F. 2d 787 (D.C. Cir. 1965) cert. denied, 382 U.S. 919(1966). In Thiel the court was concerned with the possibility that the exclusion of daily wage earners from jury service would encourage desires to discriminate against those of low economic and social status; that permiting this practice would "breathe life" into latent tendencies to establish the jury as an instrument of the economically and socially privileged.

Again, in Taylor v. Louisianna, _____ U.S._ _____ 44, 43 U.S. C.W. 4167(June 21, 1975) the Court notes its concern lie with insuring that the jury not become the organ of any special group or class.

Excusing students for the duration of their school experience hardly does similar violence to the democractic nature of our jury system. Further "this case in no way resembles those involving race or color" where "the unfortunate atmosphere of ethnic or racial prejudice" was present, Hoyt v. Florida, 368 U.S. 57 (1961), The federal courts have often noted the strong constitutional and statutory policy against racial discrimination, Alexander v. Louisianna, 405 U. S. 625(1972); Peters v. Kiff, 407 U.S. 493(1972). A similar policy favoring the interrupting of education for jury service

does not exist. Temporarily excusing students is not indicative of class or race prejudice. In Fay v. New York, 332 U.S. 261(1947) the court noted that in considering the applicability of the Fourteenth Amendment to state juries, Congress found only discrimination on account of race, color or previous condition of servitude to deserve legislative condemnation. Decided after the Thiel case, Fay v. New York held that the exclusion of jurcrs of one's occupation doesn't render the jury unconstitutional even though members of that occupational group tend to have a particular and distinctive viewpoint.

The Sixth Amendment comprehends only " a fair possibility for obtaining a representative cross-section of the community." Williams v. Florida, 399 U.S. 78, 100(1970) and forbids only the exclusion of identifiable groups. Apodaca v. Oregon, 406 U.S. 404 (1972); Peters v. Kiff, supra at 503; Brown v. Allen, 344 U.S. 443(1953). For when large and identifiable groups are excluded from jury service the effect is to remove from the jury room qualities of human nature and varities of human experience and to deprive the jury of a perspective on human events, Peters v. Kiff, supra.

Students do not constitute a particular economic, social, religious, racial, political or geographical group and do not constitute an identifiable or a recognizable class for purposes of defining a cross-section of the community for

there is no showing that they are different in viewpoint or decisional or attitudinal outlook from those who have already completed their education. Thiel v. Southern Pacific Co., supra; Ware v. United States, supra; United States v. Olson, 473 F. 2d 686 (8th Cir. 1973) cert. denied 412 U.S. 905; King v. United States, 346 F. 2d 123, (1st Cir. 1965); Chase v. United States, 468 F. 2d 141, 144(7th Cir., 1972); United States v. Gast, 457 F. 2d 141, 142(7th Cir.) cert. denied, 406 U.S. 969(1972); United States v. Kuhn, 441 F. 2d 179, 181(5th Cir. 1971); United States v. McVean, 436 F. 2d 1120, 1122(5th Cir.) cert. denied, 404 U.S. 822(1971); United States v. Tantash, 409 F. 2d 277(9th Cir.) cert. denied 395 U.S. 968(1969); United States v. Deardoff, 343 F. Supp. 1033, 1043(S.D.N.Y. 1971); United States v. Waddy, 340 F. Supp. 509 (S.D.N.Y. 1971); United States v. Guzman, 337 F. Supp. 140, 144-145 (S.D.N.Y. 1912).

All students do not share common attitudes or ideas or experience or a community of interest which cannot be adequately protected by the rest of the population. The attitudes of college educated young adults are represented on the jury panel since students were excused only until their education had been completed. "Students" are not an identifiable group of persons. Rather, "student" is a temporary status which all residents of the state hold at some point. Students come in all colors, and religions, from different social and economic backgrounds, from both sexes, and of widely varying ages and political persuasion. Appellant is not asserting a

a right to have a cognizable group represented on the jury panel but is claiming a right to have certain persons serve on the jury at a particular time in their life.

In Rawlins v. Georgia, 201 U.S. 638(1906), the Court noted that states may exempt from jury service certain classes on the bona fide ground that for the good of the community their regular work should not be interrupted. The Court has also noted that states may require residents to be intelligent or well-informed in order to be eligible for jury service and has up held the right of the state to limit service to those of particular educational attainment. Carter v. Jury Commission of Greene County, 396 U.S. 320(1970). See Brown v. Allen, supra; Fay v. New York, supra. In the interests of an educated well-informed citizenry from which to draw jury panels students should not be required to interrupt their studies and suspend the educational process.* The rights of criminal defendants with regard to jury composition are adequately protected by those whose formal schooling has been completed.

*It is impossible to compensate students for the loss of class and study time. Moreover, there is no viable standard by which a court official would determine hardship on an individual basis. Surely, such officials are not required to review the school records of each student asking to be excused and decide which of them can afford to miss class and which can not.

B. Appellant has not shown that black persons were systematically excluded from jury panels.

Appellant contends that the underrepresentation of blacks on his jury panel was constitutionally impermissible. The only evidence offered at the hearing in support of this claim was the testimony of Dr. Hamilton to the effect that the probability that one out of 65 people on the jury panel would be black is approximately 10%, indicating that blacks were not proportionately represented on appellant's jury panel. His statistical analysis was, however, meaningless, since the analysis was performed on the total population of Albany County and total black population of the county. He, of course, conceded that had a statistical analysis been performed considering only those members of the population who were eligible for jury service the result would be different (A: 68).

In any event, the evidence at most indicates an underrepresentation of blacks on one jury panel. This showing alone is insufficient. It is not the significant disparities that are unconstitutional. E.g. Akins v. Texas, supra at 403, 404. Appellant has the burden of establishing the deliberate systematic exclusion of a racial group. E.g. Alexander v. Louisianna, 405 U.S. 625(1972); Apodaca v. Oregon, supra; Carter v. Jury Commission of Greene County, supra; Swain v. Alabama, 380 U.S. 202 (1965); Whitus v. Georgia, 385 U.S. 545,

551(1969); Avery v. Georgia, 345 U.S. 559(1953); Patton v. Mississippi, 332 U.S. 463(1947); Fay v. New York, supra, United States ex rel Chestnut v. Criminal Court, 442 F. 2d 611(2d Cir. 1971), cert. denied 404 U.S. 625(1972); Smith v. Yeager, 465 F. 2d 272(3rd Cir. 1972), cert. denied, 409 U.S. 1076.

No one is entitled to proportional representation on a particular jury. Carter v. Jury Commissioner of Greene County, supra; Hoyt v. Florida, supra.

Here, appellant's own witness, Dr. Hamilton, testified that he personally knew of no systematic and intentional exclusion of black persons(A: 70). The Commissioner testified that neither he nor any member of his staff could possibly know the race of any potential juror (A: 43). The form used was provided to the court. There was no opportunity present for discriminating against black people. Indeed, the Commissioner testified that he had made a particular effort to increase the number of blacks on jury panels by mailing a disproportionate number of questionnaires to locales within the county known to be heavily populated by blacks(A: 38,46). It is apparent that this method did achieve a measure of success for the testimony indicates that jurors from areas heavily populated by blacks were overrepresented on the jury. Dr. Hamilton testified that Albany County had a total black population of about 17,000 and that 13,975 blacks resided within the City of Albany.

(A: 57, 65). Appellant's counsel made particular note of the fact that of 65 persons on the jury panel, 50 resided within the City of Albany. Thus while residents of the city constituted only 40% of the county they constituted 70% of the jury panel (A: 11).

It is thus obvious that by sending additional questionnaires to areas heavily populated by blacks, a disproportionately high number of people from those areas were represented on the jury panel. That a proportionate number of blacks were not represented on this particular panel is of no constitutional significance.

The procedures used in Albany County were such that there was no point in the selection process where people could be classified by race. The sources of the list and the questionnaires were all racially neutral. There is no evidence that blacks were totally excluded from juries or even disproportionately represented over any period of time. Swain v. Alabama, supra.

Appellant has shown no more than a statistical imbalance on one jury. This is insufficient to support a claim of an unconstitutional jury.

> "[A] mere showing that Negroes were not included in a particular jury is not enough. There must be a showing of actual discrimination because of race." Snowden v. Hughes, 321 U.S. 1, 9 (1944).

C. Appellant's claim that he was denied the equal protection of the law is frivolous.

The District Court dismissed appellant's third claim on the grounds that appellant had failed to exhaust state judicial remedies. This ruling was clearly correct. (POINT III).

However, it is equally clear that the claim is devoid of any merit.

Appellant's constitutional claim is predicated upon alleged violations of state law. As appellant notes the claim that the Commissioner of Jurors had failed to comply with provisions of state law was presented to the state courts on direct appeal. The Appellate Division unanimously affirmed the judgment of conviction. The New York Court of Appeals (Fuld, Ch.J.) denied leave to appeal. Since the underlying claim was considered and rejected by the state's appellate courts, then, in essence, appellant is asking the federal court to decide the constitutional question by substituting its interpretation of state law for that of the state. This goes beyond the proper limits of federal habeas corpus review.*

*Under state law, the mere showing of irregularities is not sufficient to sustain a challenge to the jury panel. People v. Krugh, 302 N.Y. 447, 450(1951); People ex rel. Hannon v. Ryan, 34 App. Div. 2d 393, 397(4th Dept. 1970); People v. Heteny, 36 Misc. 2d 518, 235 N.Y.S. 2d 164 (Monroe County Ct. 1949), aff'd 277 App. Div. 310 (4th dept. 1950), aff'd 301 N.Y. 757(1950).

In United States ex rel. Chestnut v. Criminal Court, supra, this court upheld the practice of excluding from grand jury participation people over 35 [illegible] age and welfare recipients though neither exclusion was authorized by state statute. This court noted that there was no denial of due process or equal protection in the absence of purposeful, private or invidious discrimination or irrational selection. In Fay v. New York, supra, the court noted that local authorities have considerable latitude in the selection of jurors since the administration of justice is a local responsibility.

Considering a claim of discrimination by police officers premised on the allegation that the police treated some people legally and others illegally thus violating the equal protection clause, the court noted "The contention is frivolous". Lisenba v. California, 314 U.S. 219 (1941); cf. Francis v. Resweber, 329 U.S. 459, 465(1947); Martin v. King; 298 Supp. 420, 422(D. Colo. 1969) aff'd 417 F. 2d 458(10 Cir. 1969)(failure of town marshall to enforce ordinance against others is not a denial of equal protection). The Equal Protection Clause mandates that state law not discriminate against classes of similarly situated persons absent a rational basis for doing so. E.g., Royster v. McGinnis, 410 U.S. 263(1973); Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 1420(1961). In this case no state law or regulation is being attacked as singling out appellant, or a class of which he is a member, for different treatment.

The unlawful administation of a valid law resulting in its unequal application does not constitute a civil right violation, even if malicious Snowden v. Hughes, supra; Birnbaum v. Trussell, 371 F. 2d 672(2d Cir. 1966). An element of purposeful discrimination must be shown and may not be assumed from a difference in treatment. Snowden v. Hughes, supra. While appellant claims that the Commissioner of Jurors violated his right to equal protection it has never been asserted, nor is there a scintilla of evidence to indicate, that Commissioner Haggerty acted differently with regard to appellant than he did as to any other criminal defendant.

> "The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the courts or the executive agencies of a state." Snowden v. Hughes, supra at 15 (Frankfurter, J. concøurring).

Appellant's claim is premised on his assumption that New York's Judiciary Law is applied differently in other counties. There is, of course, nothing in the record to reflect what the practice is in any other county.* In any event "There is no rule that counties, as counties, must be treated alike...," Griffin v. County School Board of Prince Edward County, 377 U.S. 218(1964).

*State law does provide, however, for different selection procedures for different counties. New York Judiciary Law Article 16, Article 17, Article 18.

POINT III

APPELLANT FAILED TO SATISFY THE EXHAUSTION REQUIREMENT OF 28 U.S.C. § 2254(b) WITH RESPECT TO EACH OF HIS CLAIMS.

It is fundamental that, as an applicant for federal habeas corpus relief, appellant has the burden of demonstrating that he has exhausted available state remedies.

In order to fulfull the exhaustion requirement of 28 U.S.C. § 2254, "We emphasize that the federal claim must be fairly presented to the state courts." Picard v. Connor, 404 U.S. 270, 275 (1971). Not only must the federal claim be raised in state court, but it must be based on the identical, specific constitutional ground asserted in a petitioner's habeas corpus application. Picard v. Connor, 404 U.S. 270, 276-277(1971). This Court has recently declared:

> "Specifically, we hold that, since [the petitioner] did not raise in the New York State Court the same federal constitutional claims he now urges upon the federal court, the New York Court did not have fair opportunity to consider these claims."

United States ex rel. Gibbs v. Zelker, 496 F. 2d 991 (2d Cir. 1974). Accord, United States ex rel. Nelson v. Zelker, 465 F. 2d 1121 (2d Cir. 1972) cert. denied, 409 U.S. 1045; United States ex rel. Carter v. LaVallee, 441 F. 2d 620 (2d Cir. 1971).

In United States ex rel. Curtis v. Warden of Green Haven, 463 F. 2d 84 (2d Cir. 1974), this court considered a habeas corpus application by a petitioner whose state court appeal had been raised on due process grounds and noted: "it is plainly true that a statement by a court that it had considered a defendant's Fourteenth Amendment rights does not reveal with certainty that the equal protection clause was actually weighed. Still, a possible implication of the use of such broad language is that defendant's claim was considered. . .in light of all relevant portions of the Fourteenth Amendment. . .we seriously question though whether this case satisfied the exhaustion requirements as interpreted in Picard v. Connor." 463 F. 2d at 86.

Further, the federal claim must be presented to the state court in a manner sufficient to bring it to the attention of the court. Picard v. Connor, 404 U.S. 270, 277(1971); United States ex rel. Gibbs v. Zelker, supra; United States ex rel. Carter v. LaVallee, supra at 622.

The test in Picard v. Connor is whether the state court had "a fair opportunity" to consider the alleged constitutional defect. United States ex rel. Nelson v. Zelker, supra at 1124. A "fair opportunity" means more than just a bare raising of the issue itself, and this Court has required ex-

haustion of state remedies where claims were "not sufficiently brought to the [state] court's attention", United States ex rel. Carter v. LaVallee, supra at 622; where the state court did not have sufficient facts before it, United States ex rel. Rogers v. LaVallee, 463 F. 2d 185, 187 (2d Cir. 1972); where the claim was couched in non-constitutional terms in state court, United States ex rel. Nelson v. Zelker, supra; and where factual allegations made in federal court had not been presented to the state court that considered the same claim, United States ex rel. Cleveland v. Casscles, 479 F. 2d 15, 19-20 (2d Cir. 1973); United States ex rel. Figueroa v. McMann, 411 F. 2d 915, 916(2d Cir. 1969).

Where the normal appellate process has been exhausted, this Court has required that, prior to seeking federal relief, a habeas corpus applicant must first seek relief by resort to New York State's post-conviction procedures or other remedies made available by state law. United States ex rel. Smith v. Montanye, 505 F. 2d 1355 (2d Cir. 1974) cert. denied, _____ U.S._____(1975). See United States ex rel. Johnson v. Vincent, 507 F. 2d 309 (2d Cir. 1974) cert. den. _____U.S.____(1975).

Applying these principles to the instant case it is clear that appellant has not satisfied the exhaustion requirement of 28 U.S.C. § 2254(b).

In support of his claim that students were unconstitutionally, systematically and intentionally excluded from his own jury panel, appellant relies heavily on both statistical evidence and a deposition of the Assistant Deputy Commissioner of Juror taken on March 19, 1971. Although, appellant had every opportunity, at the pre-trial hearing held on his challenge to the jury panel, to present any and all evidence available to sustain his challenge, no statistical evidence regarding the representation of students on appellant's jury panel or jury panels in Albany County generally, was presented. Likewise, the deposition of Mrs. Helen Benson, was never brought to the attention of the trial court. Nor was Mrs. Benson called as a witness by appellant which would have provided the People with the opportunity to cross-examine her as to procedures employed at that time.

Further, these factual allegations were never presented to the state courts on appeal where appellant relied exclusively on the testimony of Commissioner Haggerty which consisted solely of one answer given in response to a single question (A. 32).

Moreover while in the federal courts appellant grounds his claim on the Fourteenth Amendment rights to due process and equal protection of the law in addition to the Sixth Amendment to the Federal Constitution, an examination of his state appellate brief indicates that the only federal constitutional claim presented to the state appellate courts

was based on the Sixth Amendment's guarantee of a trial by an impartial jury (A. 99).

To the extent that appellant now seeks federal relief on the basis of constitutional grounds not asserted on appeal and on factual allegations never presented to the state courts, he has clearly failed to fulfill the exhaustion requirement.

Similarly, appellant's claim regarding the under-representation of black on his jury panel is supported by figures, extracted from the 1970 United States Census Reports which presumably indicates that black people of 21 years of age and older comprise 4.4% of the County's total population of those 21 years of age and older, evidence not presented to the state court. At his pre-trial hearing appellant offered entirely different figures which indicated nothing more than the total population of Albany County and the total black population of Albany County. The figures offered failed to reveal how many of the total population or black population, were qualified for jury service, since they were not even restricted to those who were, under appellant's definition, "presumptively eligible"; 21 years of age and over (A. 67-68). The same, irrelevant figures were relied on by appellant on appeal to the state court, where, again, his constitutional claim was predicated solely on the Sixth Amendment(A. 99-101).

Since appellant failed to present these figures to any state court and failed to raise any Fourteenth Amendment claim on appeal, he is precluded from doing so in the federal court in his attempt to obtain release.

Appellant's last claim is that the failure of the Commissioner of Jurors to comply with New York State's Judiciary Law violated his right to equal protection of the law. On appeal it was argued that there had been a departure from the requirements of the Judiciary Law in the drawing of the panel, but it is clear that this claim was asserted strictly on state statutory grounds. It was never claimed that the alleged violations of state law resulted in a deprivation of appellant's right to equal protection. The fact that the determination of the merits of appellant's constitutional claim depends on a resolution of a question of state law makes this a particularly strong case for requiring him to return to the state court. The constitutional issue appellant seeks to raise in the federal courts was not "fairly presented to the state courts" as required by Picard v. Connor, supra at 275-76. It was not presented to the state courts at all.

Finally, it should be noted that appellant's failure to raise, in state appellate courts, constitutional claims asserted in his federal petition and to present the factual allegations now relied upon, is even more glaring in view of the fact that appellant submitted, in addition to his main brief, a supplemental brief and appendix which concerned itself solely with his claim that an essential element of the crime charged had not been proved.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
~~October 27~~ November 17, 1975

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CAROL DONOHUE , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellee herein. On the 17th day of ~~October~~ November, 1975, she served the annexed upon the following named person :

Mr. Lanny Earl Walter
Counsel for Appellant
Albany Law School
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80 New Scotland Avenue
Albany, New York 12208

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Carol Donohue

Sworn to before me this
17th day of ~~October~~ November, 1975

Rhonda Ambrant Baier
Deputy Assistant Attorney General
of the State of New York